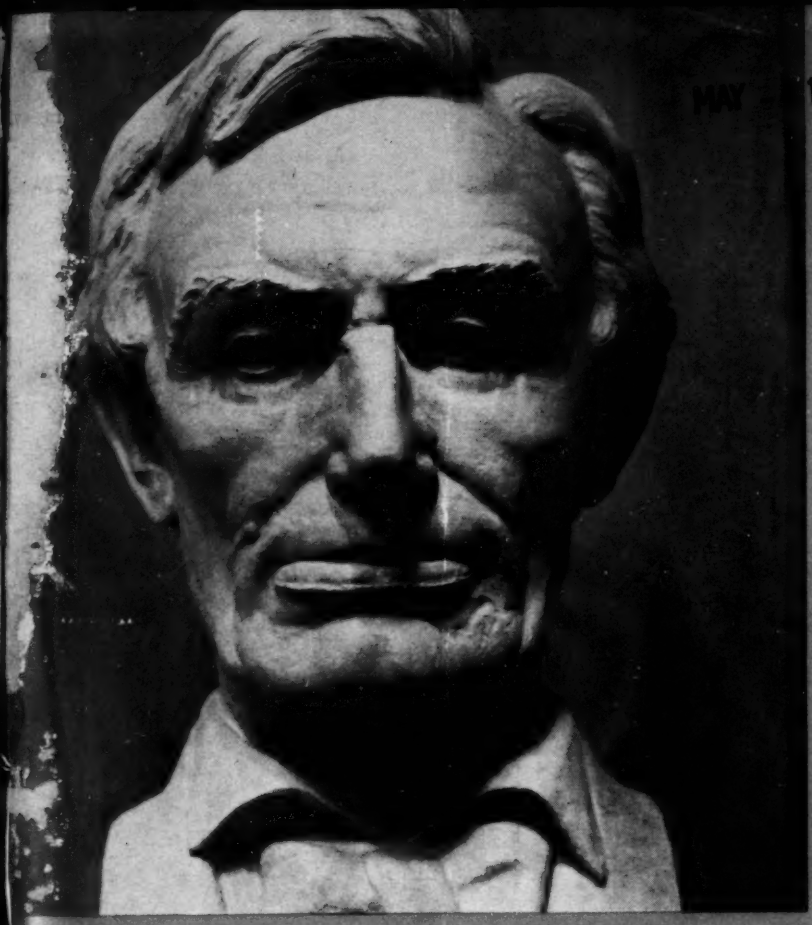

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The Los Angeles BAR BULLETIN

The Los Angeles BAR BULLETIN

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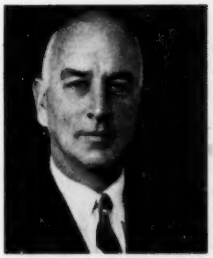


☆ ☆ ☆ ☆ ☆ ☆ ☆ ☆ A. STEVENS HALSTED, JR.

» » WHAT IS MAY DAY? Baskets of flowers on the doorstep? The crowning of a May queen and the frolic around a maypole? A parade of men and arms is Red Square? Or Law Day USA?

The first observance of May 1st as Law Day USA was proclaimed by President Eisenhower just three years ago. This event is fast growing into an important and expanding effort on the part of the legal profession, with the cooperation of many leading organizations of laymen, endeavoring to bring to Americans a deeper understanding of the values of our system of liberty under law, in contrast with the destruction of human dignity and the denial of basic human rights in large areas of the world.

The date May 1st was chosen for two specific reasons. First, it would serve as the answer from a free people to the May Day parades of Communism, with their arrogant display of military might, in countries behind the Iron Curtain. Second, this date traditionally marks the coming of spring, the awakening of the earth from its winter hibernation, the emergence of new life, the rebirth of man's hope.

This year the message of Law Day USA—a reminder that law and respect for law are fundamental ingredients of American life—will reach more eyes and ears than ever before. This seems assured on the basis of plans presently being made all over the country. The Law Day Committee of our own Association, under the able chairmanship of Frank Simpson III, is planning a number of significant events in our area. The highlight will be the dedication in the County Courthouse on May first of the magnificent bust of Abraham Lincoln called "Lincoln, the Lawyer," a gift from the members of our Association to the citizens of Los Angeles County. Professor Merrell Gage, recognized as one of the finest sculptors of Lincoln, was commissioned last year by the Association to produce this fine piece of sculpture. It is fitting that the ceremonies dedicating the statue should be part of our Law Day celebration.

A photograph of the bust appears on this month's cover. By letter each member will be invited to contribute to this significant gift to the county. A future issue of the BULLETIN will carry a roster of all contributors.

Living as we do today under the threat of world Communism, it might be well to remind ourselves of what Lincoln said some hundred years ago:

> "Our defense is in the spirit which prizes liberty as the heritage of all men, in all lands, everywhere".

Neither our accelerated research, nor

our vast expenditures on missiles and satellites, can make our defenses anything more than a brute struggle for survival unless at the same time we preserve the spirit of freedom. Any person who comprehends the meaning of world events must realize that in Communism today we are facing the greatest challenge to individual dignity and freedom under law that has ever confronted mankind. Whatever else Russia may boast of, she cannot claim freedom for her peoples as we understand that term. There, the law serves only as a crude tool to insure the supremacy of the state.

Our freedom gives us an advantage over every dictatorship. It may be difficult to properly evaluate freedom when, like the atmosphere, it is all around us. It is a treasure that only seems to be precious when it is lost. It is well, therefore, as part of the observance of Law Day USA, for all of us to reflect on the basic liberties which make our way of life unique. The celebration should be an occasion for bringing to each of us a deeper awareness of the part which the "rule of law" plays in protecting these liberties. On Law Day, then, all Americans, and all lawyers in particular, should rededicate themselves to the principles of the supremacy of the law, the independence of the courts and the integrity of the Bar.

THIS MONTH'S COVER

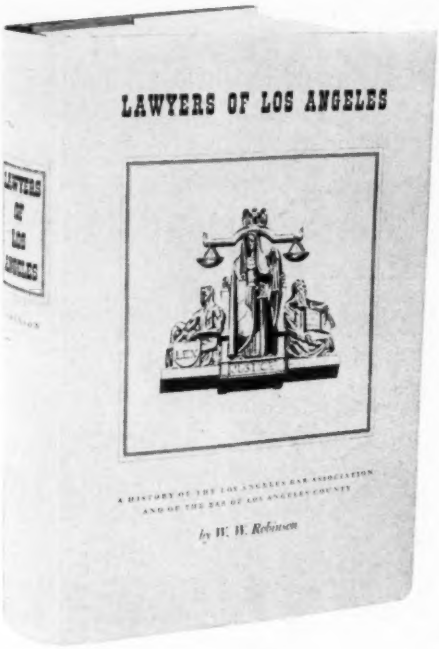
This month's cover shows the model for Merrell Gage's colossal bronze, "Lincoln the Lawyer." Mr. Gage is well known as a Lincoln sculptor and is winner of a documentary Oscar award for his film on molding the head and face of Lincoln.

The monumental bronze was commissioned by the Los Angeles County Bar Association, and will be unveiled and presented to the Los Angeles County Courthouse on LAW DAY, May 1, 1961.

The dedication ceremonies will take place at 1 p.m. on that date in the Hill Street foyer of the County Courthouse. Ralph G. Lindstrom, senior partner of the Los Angeles law firm of Lindstrom, Robison & Lovell, will speak on Lincoln as a lawyer. Mr. Lindstrom is a trustee of the Abraham Lincoln Association of Springfield, Illinois, and President of the Lincoln Sesquicentennial Association of California.

The dedication of the bronze will be open to the public. All members of the Bar are cordially urged to be present.

'MUST' *for* LAWYERS



LAWYERS of Los Angeles will find *Lawyers of Los Angeles* "must reading." Narrated by a distinguished California historian, W. W. Robinson, this is the drama-packed legal chronicle of our city's and our county's bar and of the significant events associated with them.

All the great names and famed trials which have made Los Angeles legal history may be found in the wonderfully interesting pages of this book, besprinkled with dozens of illustrations. As useful legal background and as sheer entertainment, here is a book without which no Los Angeles county attorney has a complete library.

A copy is yours for $7.50 plus 30 cents sales tax. Address:

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OFFICERS OF LOS ANGELES COUNTY BAR ASSOCIATION AND AFFILIATED BAR ASSOCIATIONS AND HONORED GUESTS AT MARCH 23 MEETING

Seated, left to right: Joseph R. Grillo, President, Southeast District Bar Association; Andrew E. Colvin, President, Santa Monica Bay District Bar Association; James C. Sheppard, President, State Bar of California; Whitney North Seymour, President, American Bar Association; A. Stevens Halsted, Jr., President, Los Angeles County Bar Association; William C. Price, President, Long Beach Bar Association; Roger J. Pryor, President, Compton Judicial District Bar Association.

Standing, left to right: Stanley Weinstein, President, San Gabriel Valley Bar Association; Mark C. Allen, Jr., President, Inglewood District Bar Association; Louis M. Brown, President, Beverly Hills Bar Association; Harry J. Crawford, President, Pasadena Bar Association; Paul Roest, San Fernando Valley Bar Association; Earl F. Riley, President, Whittier Bar Association; W. Montgomery Jones, President, Glendale Bar Association.

Not pictured: George Pike, President, Pomona Valley Bar Association; Lowell L. Dryden, President, South Bay District Bar Association.

The California Lawyer's Role In Independent Adoptions

by David Keene Leavitt

David Keene Leavitt is a member of both the Board of Governors of the Junior Bar and Adoption Committee of the Beverly Hills Bar Association. He received his A.B. and LL.B. degrees from Stanford University in 1951 and 1953, respectively, and has been practicing in Beverly Hills since 1956.

EDITOR'S NOTE: The issue of independent adoptions which is currently being considered by the Board of Trustees of the Los Angeles County Bar Association deserves careful study by all members of the Association. The publication of Mr. Leavitt's article should not be construed to be an approval by the Association or its Board of Trustees of the views stated therein.

» » IN THE NOT TOO DISTANT PAST when an unwed mother or a childless couple sought adoption of a child, as a matter of course they consulted with their attorney or physician for help, guidance and advice. It was he who might "hear of someone" whose child or home was offered. The role of the attorney was, indeed, his historic one — to assist, by advice or representation in matters whose proper handling require legal training, skill and experience.

Until shortly before World War II, adoptions were few and adoption agencies a relatively minor factor in the overall picture. There was no question that an attorney or physician could properly advise and assist the parent seeking to place a child for adoption and, in many jurisdictions, could himself lawfully place children for adoption.

After World War II, however, public and private adoption agencies multiplied and assumed a significant place in the adoption picture. With their increasing staffs, the establishment of new public and private institutions, and their tax or charitable funds, social welfare authorities in the child placement field sought "professional" status and recognition. Through national social welfare organizations they widely published their contention that only an adoption agency, staffed with trained social workers, was competent to determine the suitability of families seeking adoption and properly make the placement decision. This attitude was typified by such officials as Walter A. Heath, Director of the Los Angeles County Bureau of Adoptions who said, in an address to the Junior Bar of the Beverly Hills Bar Association:

> "An attorney has a function in adoptions, but it is not in the field of personal counselling in an area so charged with emotions as is adoptions. His job is to practice law. It begins only after a placememnt has been made."[1]

Periodically over the last ten years widely publicized charges have been made by Welfare officials that attorneys and physicians were "selling babies" or engaging in "black marketing." Recently Mrs. Katherine Kuplan, Chief of the Bureau of Adop-

[1]Text reprinted in full in 5 Los Angeles Daily Journal Reports, 88, 91 (March 1954).

tions of the State Department of Social Welfare, stated that more than 2,000 of the approximately 4,000 independent adoption placements in California each year are illegal; that there are two categories of illegal placements – the gray and the black markets; and that both the black and gray market come under independent adoptions.[2]

Adoption agencies have endeavored to eliminate adoptions through any means other than theirs, and, in a few jurisdictions, statutes have been passed eliminating independent adoptions.[3] After the Attorney General of New Jersey ruled such a statute an unconstitutional encroachment on the inalienable right of a parent, this type of regulation fell into disuse.[4] The Social Welfare attitude then changed to one of recognizing the parent's right, but insisting that it be exercised without assistance – even if such assistance was desired.[5] Such statutes have been quite effective in reducing or eliminating independent adoption, except for intra-family placements.

In California, where independent adoptions have not been so restricted, they account for approximately two-thirds of all adoptions (excluding those by a stepparent). In 1955, of approximately 6,000 new placements, 4,137 were independent adoptions and 1,945 were agency placements.[6] Out of approximately 6,600 new placements in 1958, approximately 4,200 were independent adoptions and 2,400 agency placements.[7]

Despite the contentions of superiority made by Social Welfare agencies, some attorneys and physicians have emphatically maintained that a parent, especially with professional assistance and advice, can just as effectively, and in many cases more effectively, promote and safeguard the welfare of a child in making a direct placement. It is, however, only recently that factual data supporting independent adoptions has become available.

Within the past five years, The Adoption Research Project of McGill University has collected a variety of data on the role of adopting parents. The findings from a 1956 mail questionnaire attitude study by the Project, to which over 1500 adopting couples replied, suggest that the outlook and family characteristics of independent adopters may not, after all, be so different from those of agency adopters. These findings are circumscribed by the fact that independent adopters respond less readily to the questionnaire approach.[8]

A later study by Rosenstein[9] directly compared independent and agency placements. Dr. Rosenstein examined separate groups of 30 agency adopting couples, 30 independent adopting couples and a control group of 65 couples with natural children. Each individual was personally interviewed and subjected to a complete battery of psychological tests. The results were computed and scored electronically. The statistical method was ex-

[2]Los Angeles Daily Journal, December 28, 1960.

[3]See *Ward, Study of Laws Relating to Placement of Children for Adoption and the Experiences of States in Control of Independent Adoption Placements* (Florida State Welfare Board, May 15, 1950) at pp. 5-6).

[4]*Ward, Op. Cit.* p. 6.

[5]See *Ward, Op. Cit.*, p. 4; see also Section 382, Subdvision 2 of the Social Welfare Law of New York which has been interpreted to make it a crime for an attorney to accept a fee for advising a parent in connection with the placement of a child—even if that attorney did not assist in making the placement. Similar statutes have been recently enacted in Illinois, and proposed by the Los Angeles County Board of Supervisors.

[6]See *Family Law for California Lawyers* (Cont. Ed. Bar, 1956) p. 608).

[7]See *Manual of Adoptions for Physicians* (California Medical Association, 1960) pp. 2-3).

[8]Personal conversation between the author and Professor H. David Kirk, director of the Project.

[9]*Albert J. Rosenstein, Ph.D., Comparative Study of Role Conflict, Marital Adjustment and Personality Configuration of Private and Agency Adoptive Parents,* Dissertation Abstracts, University of Michigan Press, 1959.

amined and approved by a faculty committee of the University of Southern California.

According to Dr. Rosenstein:[10]

"Independent adopters showed less psychopathology than agency adopters; they showed better marital adjustment and less conflict within the family. * * * The independent adoptions more closely resembled the natural parent-child relationships than did the agency ones."

Dr. Rosenstein attributes the closer attitudinal resemblance of independent adopters and their children to natural families partially to the more natural and comfortable relationship between physician and patient, or attorney and client. This encouraged open and frank behavior. Rosenstein says that agency applicants are often so anxious to give the "right" answer that they neglect to give the true one. The basic contention of social welfare agencies, i.e. that they can better select a proper home for the child, has been seriously challenged by this and other studies.

In 1945 the California Legislature enacted Section 224(q) of the Civil Code, which provides as follows:

"Any person other than a parent or any organization, association, or corporation that, without holding a valid and unrevoked license or permit to place children for adoption issued by the State Department of Social Welfare, places any child for adoption is guilty of a misdemeanor."

Of course the acts proscribed by this statute depend completely upon the meaning assigned to the word "places". Exhaustive search of the authorities has failed to disclose a case defining this term. Its ambiguity has, however, given rise to several questions: (1) Can an attorney lawfully assist natural parents to place their children for adoption? (2) Can assistance take the form of the attorney acting as an intermediary between natural and adopting parents? (3) At what point does an attorney go beyond assisting a parent and himself "place" the child? (4) What is a placement?

In the view of some social welfare officials, this statute forbids any participation in the placement by attorneys, physicians or others than a natural parent. Said Mr. Heath in the address above mentioned:

"I know that some of you are beseiged by couples who want a child and by mothers who want help in placing a child. The easiest and best advice I can give you, but perhaps the hardest to follow is—DON'T. IT'S AGAINST THE LAW."[11]

Section 224(q) is similar to statutes in other states, including Washington, North Dakota, Rhode Island, Colorado, Delaware, Georgia, Utah, Illinois, Texas and North Carolina.[12] Such statutes must be contrasted with others which prohibit not only the placing of a child by unlicensed persons (except natural parents), but also proscribe unlicensed persons from *assisting or arranging placements* for adoption. Several of these statutes antedate Section 224(q).[13] What little case and other authority there is concerns the latter type of statute which is to be found in Indiana, New Hampshire, Virginia and Wisconsin and in the District of Columbia.[14]

The Legislature could easily and expressly have prohibited attorneys,

(continued on page 202)

[10]Personal conversation with the author.
[11]5 Los Angeles Daily Journal Reports 88, 91 (March 1954).
[12]*Ward, Op. Cit.*, p. 3.
[13]Section 32.784, D. C. Code, 1940, was enacted in 1944; Section 48.37(1), Wisconsin Stats, was enacted in 1929.
[14]*Ward, Op. Cit.*, p. 4.

Domestic Relations Investigators

by Honorable Roger Alton Pfaff

Judge Presiding in the Consolidated Domestic Relations and Conciliation Courts

History

The Superior Court of Los Angeles County, in 1929, first inaugurated the practice of utilizing trained investigators in domestic relations cases where custody of minor children was a contested issue. In the beginning two assistant probation officers were officially assigned to the court. Since that time, due to rapid population growth and an inevitable increase in domestic relations cases filed, the court's staff of investigators has of necessity been enlarged until at the present time a Supervisor and eight full-time investigators are employed.

Procedures

Section 263, California Code of Civil Procedure, provides in part as follows:

". . . In any county, or city and county, which is authorized by law to have domestic relations investigations, it shall be the duty of such domestic relations cases investigators, in any divorce action then pending wherein the parties thereto have minor children, to investigate and to report to the judge of the court wherein such action is to be tried all pertinent information as to the care, welfare and custody of the minor children of the parties to the divorce action.

"Such report shall be filed not less than 10 days before the date set for the trial of the divorce action with the clerk of the court wherein such action is to be tried, and not less than 10 days before the trial of such action a copy of the report shall be served on each party to the divorce action.

"The report of the investigators shall be admitted in evidence upon the stipulation of both parties, and shall be competent evidence as to all matters contained therein.

"Nothing in this section shall be construed as limiting a domestic relations cases investigator's duty to assist the superior court appointing him in the transaction of the judicial business of said court."

Purpose

Trained domestic relations investigators are primarily objective "fact finders" for the court, providing the trial judge with detailed information concerning the existing physical, moral and emotional conditions under which a child is presently living or those under which he will be living if his present custody is changed. Investigator's reports save valuable court time by eliminating the necessity of many witnesses appearing to testify and in many instances avoiding a court trial completely. Tensions and bitterness between the parties are increased by public recitations in the witness box of real or alleged miscon-

Judge Pfaff is Presiding Judge of the Consolidated Domestic Relations and Conciliation Courts of Los Angeles. He has received national recognition for his work in the field of domestic relations and particularly the Conciliation Court, the procedures of which Court have been used as a model in many other California counties and other states. He is a Past President of the Conference of California Judges and is Chairman of the Matrimonial Actions Committee of the Family Law Section, American Bar Association.

duct on the part of the other. By avoiding such formal court hearings, personal animosities are reduced and future amicable relationships between the parents are fostered, thereby providing a more harmonious and stable environment for the children.

In addition to expediting the administration of justice and stabilizing family relationships, such investigations provide a fine public relations program for the bench and bar. The chronic complaint of witnesses who are subpoenaed into court with a consequent loss of wages and frustrating delays is practically eliminated, since the witnesses have been interviewed by the investigator in most instances at their convenience.

Functions

The investigator is a fact finder for the court. His functions do not include family counseling or becoming involved in psychological or psychiatric therapeutic procedures. There is always the temptation, particularly where an investigator has some background or experience in psychology or psychiatry, to stray afield from fact finding. Invariably when this occurs trouble ensues. Attorneys complain to the court that the investigator is taking sides or unduly meddling in their client's affairs. In one such instance a husband took a tape recording of an involved conversation with the investigator, embracing innumerable unrelated psychological matters, including the pros and cons of certain sexual behavior patterns, all of which later proved to be of considerable embarrassment to the well-intentioned but unwise investigator.

The investigator is an officer of the court and clothed with considerable authority in such position. He is issued a Deputy Sheriff's badge and other credentials which permit him to inspect records and interview individuals. Private investigators do not have this authority.

The investigator at all times, by attitude and action, should maintain strict neutrality between the parties. He is not an advocate of the respective claims of the contestants, and his primary concern is the welfare of the minor children.

Perhaps the most succinct and clearest way to explain the procedures followed in a contested child custody case where an investigator is appointed would be to delineate the chronological steps taken by attorneys, investigator and the court.

(1) At the Order to Show Cause hearing relating to child custody, the attorneys may request the court to, or the court on its own motion may, appoint an investigator. If an attorney for one party or both attorneys express a desire to stipulate to such appointment, the court inquires as to its necessity. This should be a uniform practice, for in many instances such appointment is simply a delaying tactic on the part of one party to the action. In other cases a brief inquiry

by the court will reveal that the issues do not merit the expense of such an investigation; that a short hearing by court or commissioner will solve the controversy.

In some cases the court, by restricting the investigator's report to the one specific facet of the custody conflict in issue, can eliminate the customary over-all lengthy investigation and report.

(2) The court, prior to appointment of the investigator, makes the following statement: "May it be stipulated that the investigator's report may be received in evidence wihout the necessity of the investigator being personally present at time of hearing." Invariably the attorneys so stipulate.

This stipulation is vital to the efficient administration of the investigative staff and in no wise prejudices either party. It is understood that this stipulation does not preclude either party from calling additional witnesses or the same witnesses interviewed by the investigator to augment or refute the report. Nor does it preclude having the investigator personally present if one of the parties demonstrates to the court that the report is seriously in error.

However, prior to demanding such stipulation, all too frequently the party receiving an adverse recommendation in the report subpoenas the investigator (thereby causing him to lose a valuable day in the field investigating), not for the purpose of correcting errors in the report, but simply to harass, embarrass and discredit the investigator on trivial procedural details.

(3) In the Civic Center, immediately after the investigator has been appointed, the attorneys and clients take the court file and report to the secretary of the Domestic Relations

Investigations. There the clients complete information forms which include the names of the three or four chief witnesses to be interviewed. Branch courts now have such forms, the use of which avoids considerable delay necessitated by having the investigator mail such information forms to the parties' attorneys, who in turn had to contact their clients, have the forms completed, and then return them to the investigator.

(4) After a case has been assigned to an investigator, the secretary of Domestic Relations Investigations secures the divorce file from the County Clerk's office and keeps it available for the investigator to save him time in procuring the file personally. With the information forms, court file, and folder containing other pertinent information, including the names of the parties' attorneys, the investigator is ready to proceed.

(5) At the inception of the proceedings releases are secured from the parties, enabling the investigator to interview and obtain information from public and private agencies, including the parties' doctors, school records, and in cases of emotional disturbances, psychologists and psychiatrists. All of this information not only saves valuable time but is of great assistance in preparing a comprehensive and accurate report.

The keynote of the entire investigation is directed toward the best interests of the children. Interviews are held in the investigator's office, when such interviews can be arranged at the convenience of the witnesses. Over half of an investigator's work is in the field interviewing witnesses and public and private agencies that may provide pertinent information bearing upon the case.

(6) Armed with all the factual data in the case, the investigator dictates his report setting forth concisely the facts found, the respective contentions of the parties, the corroborative statements made by the parties' respective witnesses, and information from public and private agencies, including school teachers, doctors, etc. Also included is a recommendation to the court as to the ultimate disposition of the matter.

(7) Formerly these reports were placed in the court file, which is open to public inspection. This practice has been discontinued, the original report now being filed as an exhibit subject to being opened only by the court. However, a copy is sent to each party's attorney prior to the hearing date, as provided by law.

(8) Where one of the parties appears in pro per, the court has established the policy of notifying such party that the investigator's report has been filed, and inviting him to read same in the Domestic Relations Investigations office. This procedure should be strictly followed. Experience has shown that where a party to the divorce action secures possession of the investigator's report he too often harasses and badgers the witnesses reporting unfavorably, whereas most attorneys, as officers of the court, are much more discreet and circumspect in their use of such reports.

(9) A considerable number of cases assigned for investigation are requested after the interlocutory or final judgment of divorce has been entered. It was discovered that in many such cases several investigations had previously been made due to the parents continuing a series of custody battles, using the children as legal brickbats, to harass each other. In other instances

(Continued on page 211)

Lessor's Tax Problems — Bankruptcy of Lessee

by Howard C. Alphson

Howard C. Alphson is a member of the Committee on Tax Problems of Farmers of the American Bar Association Section on Taxation, as well as a member of the Los Angeles County Bar Association Committee on Taxation. Born in North Dakota, he received a B.S. degree in Commerce from the University of North Dakota in 1941, and he received his LL.B. degree in 1948 from Harvard Law School. Mr. Alphson is a partner in the Los Angeles law firm of Knapp, Gill, Hibbert & Stevens.

» » THE RECENT PUBLIC ANNOUNCEMENT that a major grocery chain had filed a petition in reorganization under the provisions of the Bankruptcy Act prompted an immediate examination by lessors of market leases to ascertain their right to terminate should they elect to do so. Certain leases have provisions sufficiently broad to permit termination in the event of filing a petition in reorganization, whereas others are limited to certain acts of bankruptcy and do not encompass the filing of such a petition.

The purpose in determining whether a right to terminate exists is to ascertain the advisability of releasing the premises to another market operator. In this connection the lessor is, of course, primarily concerned over the adverse effect of a closure for even a day upon the potential business of the market. Assuming that the operation can be a continuous one and a take over arranged by a new operator then various tax considerations are presented.

One of the more intriguing tax aspects is the effect of termination of the lease on the lessor's income where the original lessee, now in bankruptcy, paid a portion of the cost of the improvements and the lease provides for vesting of title to the improvements in the lessor on termination. The particular problem presented is whether, upon voluntary termination by the lessor, he is required to report the fair value of the improvement in gross income. Under the provisions of Section 61, I.R.C., containing a general definition of gross income, if the improvements were intended to be in lieu of rent, then their value would be required to be reported in gross income for the year of completion of the improvements. IT 4009, 1950-1 CB 13. However, Section 109, I.R.C. excludes income (other than rents) derived by the lessor of real property "on the termination of a lease, representing the value of such property attributable to buildings erected or other improvements made by the lessee." Frequently, such improvements are essentially for the benefit of the lessee who intends to establish a minor shopping center of his own. In consideration for the usual rental of the market premises, he is entitled to use the ground upon which he erects the improvements. The only ad-

ditional consideration for the lessor results from inclusion of the gross proceeds from operations in the lessee's improvements in the measure of percentage rentals payable to the lessor. Thus, construction of the improvements is normally not intended to constitute consideration in lieu of rent. In such a case, the lessor on termination of the lease would have no additional gross income on receipt of the improvements and yet have the right to rent the additional improvements, on which he has had no cost, at an increased rental.

Although the lessor to some extent may both have his cake and eat it, he does not achieve any increase in his tax basis for computing depreciation by virtue of receipt of improvements on termination of the lease where he is not required to report them in income. If the value of the improvements is required to be reported in gross income as in lieu of rental, a new basis is to that extent obtained. Section 1019, I.R.C.

A related question which arises in the event of termination is whether the lessor by virtue of the termination realizes a tax deductible loss. Generally, the loss of anticipated future income is not a deductible loss because the transaction has not closed sufficiently to identify and determine the amount of the loss. This principle has been held applicable in the case of cancellation of a lease by the lessor. *Hort v. Commissioner,* 313 U.S. 28, 61 Sup. Ct. 757.

BAR ACTIVITIES

Calendar

Los Angeles County Bar Association

Committees

April 19—Federal Courts Criminal Indigent Defense, 5:00 p.m.

April 20—Legal Ethics, 12:15 p.m.

Sections

April 20—Probate and Trust Law luncheon, Conference Room #1, Biltmore, 12 noon.

Junior Barristers

April 21—Monthly luncheon meeting, University Club, 12 noon.

General Monthly Meeting

April 27—Biltmore Bowl, 12 noon. Speaker, Judge Philbrick McCoy. Title: "A Few Brass Tacks."

Law Day USA

May 1—Presentation of Lincoln Bust, 1:00 p.m., Los Angeles County Courthouse. Please watch for other announcements of various activities scheduled for the observance of Law Day by the Los Angeles County Bar Association and by each of the 13 affiliated bar associations.

Affiliated Associations

April 19—Whittier Bar Association, dinner meeting, Shangri-La Restaurant, Pico-Rivera, 6:30 p.m., Grant B. Cooper, Speaker.

April 19—Pasadena Bar Association, dinner meeting, University Club, Pasadena, 6:00 p.m.

State Bar of California

September 25 to 29—Thirty-third annual meeting, Monterey.

American Bar Association

August 7 to 13—Annual Meeting, Chase-Park Plaza Hotels, St. Louis, Mo.

(Official announcements concerning events of interest to members of the Los Angeles County Bar Association will be included in the Calendar as space permits. The deadline for submission of dates is the 20th of the prior month. Please send information to the Office of the Bar Association.)

notes from your Law Library

by JOHN W. HECKEL • Head Reference Librarian, Los Angeles County Law Library

Books for Law Day U.S.A.

Abernathy, Glenn, *The Right of Assembly and Association* (Columbia: University of South Carolina Press, 1961), 263 p.

Beaney, William M., *The Right to Counsel in American Courts* (Ann Arbor: University of Michigan Press, 1955), 268 p.

Beebe, James W., *Tomorrow's Weapons vs. The Constitution* (Madison: University of Wisconsin Law School, 1959), 86 p.

Black, Charles L., Jr., *The People and the Court; Judicial Review in a Democracy* (New York: The Macmillan Co., 1960), 238 p.

Caughey, John W., *In Clear and Present Danger; The Crucial State of Our Freedoms* (Chicago: University of Chicago Press, 1958), 208 p.

Chafee, Zechariah, Jr., *Three Human Rights in the Constitution of 1787* (Lawrence: University of Kansas Press, 1956), 245 p.

Curtis, Charles P., *Law as Large as Life: A Natural Law for Today and the Supreme Court as its Prophet* (New York: Simon and Schuster, 1959), 211 p.

Fellman, David, *The Limits of Freedom* (New Brunswick: Rutgers University Press, 1959), 144 p.

Fordham, Jefferson B., *The Legal Profession and American Constitutionalism* (New York: Association of the Bar, 1957), 32 p.

Fraenkel, Osmond K., *The Supreme Court and Civil Liberties; How the Court has Protected the Bill of Rights* (New York: Oceana, 1960), 173 p.

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THE HI JINKS COMMITTEE FOR 1961 IS ABOUT TO BE FORMED.

This Committee is responsible for the writing, directing, producing and staging of the annual Christmas Hi Jinks show.

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Newcomers welcome.

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Persons Who Served On The Federal Courts Criminal Indigent Defense Panel During January, February and March, 1961

January

Richard P. Byrne
Robert S. Cogen
Frank Goodman
Harry L. Hupp
Sheldon M. Kaufman
Donald H. Keltner
Donald Kemby
Richard A. Klein
Herbert Kraus
Hiram Kwan
Robert Lane
Morris Lavine
William A. MacLaughlin
George C. Mitchel
Rodney E. Nelson
William A. Norris
Russell E. Parsons
Jerome F. Prewoznik
Charles A. Price
Robert S. Priver
Edward S. Renwick
John Reynolds
Romaine Richmond
Edward J. Riordan
Hugh R. Sommers
David J. Vinje
James Zukor

February

George Baltaxe
Philip F. Belleville
Leo Bronwich
Gene Chaikin
Stephen Claman
Stuart J. Faber
Stanley Fimberg
David Finkel
Bryon J. Hayes, Jr.
Paul Leevan
Seymour Mandel
James K. Mitsumori
Thomas S. Mulligan
Frank E. Munoz
Bayard G. Nilsson
Richard F. Oetting
Robert S. Priver
Donald F. Rocke
Manfred Rosenfeld
Martin J. Schnitzer
Huey Shepard
James L. Sobieski
Lessing C. Solov
George W. Treister
Robert W. Zakon

March

Edwin C. Boehler
Paul Caruso
Patrick E. Duggan
Ronald E. Gother
Joseph T. Hitzman
Norton S. Karno
William D. Keller
William A. Kemmel, Jr.
Robert Kogan
D. C. Korman
Michael J. Parker
Russell R. Pratt
Gerald Raydon
Frank P. Rosen
Gilbert D. Seton
Lawrence J. Sheehan
John Sobieski, Jr.
Peter C. Tornay
Calvin Torrance
Isabelle Trotti
Francis M. Wheat
John J. Wilson
Robert J. Wise
Irwin F. Woodland

THE CALIFORNIA LAWYER'S ROLE IN INDEPENDENT ADOPTIONS . . . *from page 191*

physicians or others from acting as an intermediary or assisting or arranging placements by adding a few words to Section 224(q) when it was drafted. Many believe that when Section 224(q) was enacted, there was no legislative intent to impair or curtail the practice of law or the practice of medicine with respect to clients who might retain the professional services of a lawyer or physician for advice, counsel or assistance in an adoption matter.[15] The law expressly reserves the right of placement to the natural parent, and it is evident that this right can not be exercised in a vacuum.[16] A similar view was expressed by Dr. Jacobus ten Broek, a professor, lawyer and presently Chairman of the California State Board of Social Welfare when he wrote:

"What is forbidden is the act of placement. It is then, of course, perfectly permissible for parents, expectant parents and persons seeking a child to consult with their doctor, lawyer, minister, high school counselor or friends and for the persons so consulted, with or without a fee, to impart advice and information. The no-mans land between the forbidden act and the permitted advice is very large and its boundaries indistinct."[17]

On the other hand, the California Attorney General published an opinion[18] construing Section 224(q). The opinion was based on the following hypothetical case:

"An expectant mother tells her obstetrician that she does not want to keep her baby. The obstetrician informs an attorney who contacts the expectant mother. The attorney tells her he has a client who will pay all expenses of confinement and adoption. The expectant mother agrees to the plan. She did not select the people to adopt the child nor does she see them or know their identity. Upon the birth of the child the attorney, through an intermediary, obtains physical custody of the child and has the child delivered to his client."

This, according to the Attorney General, was a "clear and almost classic violation" of the section since the attorney did everything necessary to the placing of the child. It should be noted that the example indicates no participation whatever in the designation of adopting parents by the natural parent nor in the actual transfer of custody to them.

Commenting on the Attorney General's opinion, the Special Committee on Adoptions of the Los Angeles Bar Association said:

"The committee is of the unanimous opinion that this Attorney General's opinion did not and was not intended to preclude the natural mother from seeking the advice and counsel of any person she desired, and particularly the advice and counsel of a doctor or lawyer. If the opinion of the Attorney General should be construed as prohibiting such counsel and advice, your committee has unanimously felt that the opinion would constitute an unreasonable invasion of the rights of the natural mother by compelling her to make her decision in a vacuum."[19]

But suppose an attorney does more

[15] *Report of the State Bar Committee on Adoptions*, October 29, 1954.

[16] See *Callister, The Lawyer and the Independent Adoption*, 29 Los Angeles Bar Journal 375, 379 (September 1954).

[17] *ten Broek, California's Adoption Law and Programs*, 6 Hastings Law Journal 261, 262 (1955).

[18] 23 Ops. Atty. Gen. 25 (1954).

[19] *Final Report of the 1955 Special Committee on Adoptions of the Los Angeles Bar Association*, pp. 4-5.

than merely "advise"? May he ethically render assistance in the form of acting as an intermediary between natural and adopting parents?

In 1954, hearings on the possible amendment of Section 224(q) were held before the Judiciary Committee of the California Assembly. By resolution of their respective houses of delegates, the State Bar and the California Medical Association urged the Legislature, in the words of the latter, to "clarify the adoption laws by adding a section thereto specifying that the parent of a child has the right, in presenting the child for adoption, to act through her attorney or physician or both, and to have legal advice and medical assistance in this field as in all others."[20] In reporting upon its refusal to amend the section, the Judiciary Committee said:

"Attorneys and physicians serve in something of the capacity of an intermediary between the natural mother and the persons with whom she places the child.

"In January 1954, the Attorney General published an opinion . . . [which] caused concern among some attorneys. They contend that the opinion leaves them in an uncertain position as to just what they may properly and legally do under the law without subjecting themselves to misdemeanor charges in assisting the natural mother or parent in the placement of their children for adoption.

"Findings and recommendations:

"The committee is of the opinion that there is a legitimate place for the true independent adoption and attorneys and physicians do perform a legitimate role, both legally and ethically in such matters and does not understand the Attorney General's opinion as ruling out this legitimate participation by attorneys and physicians."[21]

It would only be in the rare case that the natural parents would have actual knowledge of persons who are interested in adopting their baby. If the intermediary collects, for the use of the natural parent, facts concerning the background and situation of prospective adopting parents, it would seem logical to contend that this is a perfectly natural extension of the inherent right of placement expressly reserved to the natural parent by law.[22]

Deputy Attorney General Richard L. Mayers, author of the 1954 Attorney General's Opinion, personally seems to concur with this point of view. In drawing the fundamental distinction between permissible assistance and third party placement, Mr. Mayers wrote:

"I recognize that a natural parent frequently obtains information as to the existence of people who are interested in adopting her baby from doctors, ministers, taxicab drivers, bartenders, and hospital nurses, but the *use* of this information *by the natural parent* is something quite different from the factual situation set forth in the Attorney General's opinion . . . In those examples, the information provided was not used by the parent, but was used by the intermediary. Therein, as I see it, lays the difference."[23]

At what point does an attorney go beyond "assisting"? When does he himself place the child?

There are two essential elements in every placement: (1) designation of the adopting parents, and (2) an act transferring or directing the transfer of the child's custody pursuant to that

[20] *ten Broek, Op. Cit.*, p. 262.

[21] *Report of the Assembly Interim Committee on Judiciary* (House Resolution No. 197, 1957) dated March 1955, Chapter 3, Subsection E, *Adoptions*, p. 36.

[22] See *Callister, Op. Cit.*, p. 379.

[23] *Letter*, dated September 29, 1954, to E. Talbot Callister, Chairman, Adoption Committee, Los Angeles Bar Association.

designation. Custody can, of course, be transferred only by one who *has* custody. Both elements must be present in order for a placement to have been made.

For example, Miriam, leaving the infant Moses adrift in the bullrushes to be taken by anyone who happened along, *abandoned* him; she did not *place* him. An act transferring custody was present but no foster parents were designated.

Conversely, a parent who has chosen adopting parents for her unborn child, but who later decides to keep him, cannot be said to have placed the baby. No act transferring custody took place. It would be absurd to contend that she could place and keep her child at the same time.

The act transferring custody may, under some circumstances be performed by an intermediary acting without discretion and under the authority of the natural or adopting parents. For example, if a mother designates her favorite cousin to adopt the child, the act of an intermediary (such as a nurse, servant or friend of the mother or cousin) taking custody of the child and delivering it to the cousin would not constitute placement by the intermediary. The essential element is that the intermediary has no discretion as to whom he delivers custody of the child. Another example of this situation, commonly encountered, is a mother's release of her child from the hospital to designated adopting parents by execution of an Infant Dismissal Report. This form is required by Section 1620.5 of the Welfare and Institutions Code in every case where the custody of a child under 16 years of age is released by a hospital to any person other than its parent or a relative by blood or marriage. There, the act of transferring custody is performed by the hospital although the placement is made by the parent who signs the form bearing the adopting parents' names.

Previous attempts to define the word "placement" have been confused by the injection of a moral or qualitative element into what is essentially an act of legal significance. Whether a placement is made does not depend upon whether it is good or bad, wise or foolish, considered or frivolous. A parent can make a placement (however recklessly) by simply handing his child to the first person he meets on the street: or, hearing that the Joneses are nice people who want to adopt a child, sending a friend to give the child to Mrs. Jones.

Of course such examples are extreme; they illustrate lamentable judgment and a subsequent adoption proceeding might not be approved by the court—but they *are* placements. The parent designated the adopting parent and acted to transfer custody.

It is the duty of the professions and social welfare agencies alike to prevent such foolish, frivolous or bad placements and promote thoughtful and intelligent ones. While an attorney or physician should not interfere in any way with the right of a natural parent to place the child, he must make certain that the natural parent has freely consented to the adoption of his child and placed him with adoptive parents on the basis of full information concerning their background.[24]

What then is a placement? It is an *act* by one having legal or physical custody of a child, transferring or directing the transfer of such custody to a designated person or persons.

The authorities dealing with place-

[24]See *Family Law for California Lawyers* (Cont. Ed. Bar, 1956), p. 611.

ment law violations are consistent with the above view. In addition to the opinion of the California Attorney General, mentioned above, there are only two reported cases on the subject: *Goodman v. District of Columbia*[25] and *Anderson v. District of Columbia*.[26] There is also an opinion of the Attorney General of Wisconsin.[27] The statutes of both Wisconsin[28] and the District of Columbia[29] prohibit assisting or arranging placements as well as placement itself by unlicensed third parties. In both decided cases, five hypothetical cases considered by the Wisconsin Attorney General and the example employed by the California Attorney General, placement violations were found only where the parent did not participate at all in designating adopting parents. In each violative case, the only person designated by the parent to take custody was the attorney himself and he, in turn, after taking custody of the child, delivered it to adopting parents of his own choosing.

To what extent must the natural parent participate in order to place the child within the meaning of Section 224(q)? He must make the ultimate decision as to who adopts the child and act to effect a transfer of custody. Whether this has been done is a question of fact and is independent of the extent of the natural parent's acquaintance with or knowledge of facts about the adoptive parents. A natural parent who executes an Infant Dismissal Report directing the release of her child from a hospital to named adopting parents has placed her child as a matter of law.

But what must attorneys and physicians do to encourage intelligent placements? How much should a natural parent know about adopting parents in order to make a wise placement? Should she know their race, religion, health, age, education, financial status, etc., but not where they live? Should she personally meet them? Most attorneys and physicians agree that the natural parent must be given an opportunity to meet and know the adopting parents, but if she decides that she does not want to see them or know their names and address she is entitled to deny herself that information in favor of her peace of mind.

A persuasive argument in support of the view that natural and adoptive parents should personally meet can be found in *Family Law for California Lawyers*,[30] at pages 625-626:

"The adopting parent who is haunted by fears of future attempts by an irrational parent to contact the child in its new home or to disturb its security will have such fears rapidly dispelled by seeing that the parent is a normal individual acting with intelligence in a time of stress and quite obviously incapable of taking any action that would be to the detriment of the child or its new home. The natural parent will be reassured on seeing the adopting parents as warm, flesh and blood people, who are eager to give the child the love and affection it needs. Occasionally, such a meeting will demonstrate to one or another of the participants that the plans which appeared on paper to be acceptable have a serious flaw. This, too, redounds to the ultimate benefit of the child and the parties involved. and can only result in the making of other plans which are better calculated to promote the best interests of the child and the parties."

[25](D. C. Mun. Ct. of App., 1947) 50 A. 2d 812.
[26](D. C. Mun. Ct. of App., 1959) 154 A. 2d 717.
[27]37 Wisc. Atty. Gen. Ops. 403 (1948).
[28]Wisconsin Stats., Section 48.37(1).
[29]D. C., *Code*, 1940, Section 32.782 (1944).
[30]*Op. Cit.*

The 1955 Special Committee on Adoptions of the Los Angeles Bar Association answered as follows:

"Your committee feels that if the natural mother wishes to insist on knowing the names, address and telephone number of the adopting parents . . . she should have the right to receive such knowledge . . . On the other hand, many natural mothers follow the advice of doctors; they do not insist on knowing the identity of the adopting parents. Your committee believes that such a mother should have the right to instruct anyone connected with her adoption case that she is not to be told that information, and that such information is to be withheld from her."[31]

The particular responsibilities of the attorney toward the various parties to an adoption can be summarized as follows:

A. He should recognize the fundamental right of the natural parents to make a free and independent decision which they feel is best for themselves and the child, and by a personal interview fully advise the natural parents of the counselling and other services, including agency adoption services, available to them in the community and to which they may refer in arriving at a decision.

B. He should advise the natural parents, once their decision is made to place the child for adoption, that the lawyer will be attorney of record for the adopting parents, and present to the natural parents comprehensive facts and background information relating to the adoptive parents.

C. Having given this advice and information, the lawyer should obtain from the natural parents a marital, social, mental and physical history of each and his hereditary background.

D. He should advise the adoptive parents of all available pertinent facts concerning the hereditary and social background of the child and each of his parents, and urge them to obtain from the attending obstetrician and pediatrician complete information regarding the mental and physical condition of the child.

E. He should emphasize to the adopting parents that they are taking a calculated risk in that they have no assurance of having the child permanently until the decree is granted, which is usually six months or more after the petition for adoption is filed.

F. He should inform the adopting parents that their names will appear in the Infant Dismissal Report and the consent to adoption when it is executed by the natural parent before an agent of the State Department of Social Welfare or licensed county adoption agency.

If one attorney should do all these things, would it not create a serious "conflict of interest" problem? Can one attorney ethically represent both natural and adopting parents?

According to the Standing Committee on Professional Ethics and Grievances, American Bar Association, such representation, even with consent of the parties, would be a violation of Canon 6.[32] The rationale of the opinion was expressed as follows:

"The natural parents are surrendering custody and control, while the adopting parents are interested in the completeness of their own succeeding custody and control. Under these circumstances a lawyer who

[31] *Report of the 1955 Special Committee on Adoptions of the Los Angeles Bar Association.* See 31 Los Angeles Bar Bulletin 327, 328 (September, 1956).

[32] 32 *State Bar Journal,* 343 (July-August 1957), republished in *Drucker and Contini, Adoption Procedures in Los Angeles County Superior Court* (1957) at p. 38.

would represent both sets of parents would be representing conflicting interests. He could not render singleness of representation to one set of parents without subordinating the interests of the other set of parents. Also the nature of this proceeding relating to a child is such that the public interest is involved."

A contrary view was expressed in *Family Law for California Lawyers:*[33]

"Except in rare cases, there is only one lawyer in an adoption case, and he should accept this fact as normal and inevitable. He should make it abundantly clear to all concerned . . . that as a lawyer he accepts the function of resolving the various interests with his legal skill and counsel; and that, as to each participant, he will hew to the line and let the chips fall where they may."

In 1959 the question was squarely presented to the Supreme Court in *Arden v. State Bar.*[34] In that case, the attorney originally represented the natural parent. Through his efforts, she was introduced to the adopting parents. At their request, and with the knowledge and consent of the natural parent, the attorney was employed to represent the adopting parents in the adoption proceedings. The attorney's fee was entirely paid by the adopting parents. Several months after the petition for adoption was filed, the natunal parent, after vacillating, signed her written consent to the adoption. Shortly thereafter, she contacted the attorney and demanded her child back. Certain conduct of the attorney at this point resulted in disciplinary proceedings being instituted. To the contention that the attorney had violated the "conflicting interests" section of the Rules of Professional Conduct, the Supreme Court said, at page 317:

"The local committee concluded that petitioner had not violated Rule 7 of the Rules of Professional Conduct, because [the natural mother] had knowledge of and consented to the petitioner's representation of the [adopting parents] in the adoption proceedings, and also because no conflict of interest existed until sometime after her consent to the adoption had been filed. *This determination was correct.*" (Emphasis added)

The Supreme Court then went on to say at page 319:

"Here petitioner had been employed by both [the natural mother] and [the adopting parents] in the adoption proceeding. As has been pointed out above, this dual representation was found to be proper."

Since the Supreme Court considered, cited and rejected the views of the American Bar Committee, it must be taken as settled, at least in California, that such dual representation by an attorney is proper in adoption matters.

No subject has provided more ammunition for attacks on independent adoptions than the money involved. Social welfare authorities constantly imply that the costs of independent adoptions are exorbitant in comparison to the $400.00 to $600.00 fees charged adopting parents by public and charitable agencies. In truth, the costs of both procedures are comparable. Independent adopters must, however, pay all of the costs; they seldom have help from taxpayers or charitable contributors.

The fees charged by public and charitable agencies seldom represent even one half of the actual costs involved. It has been estimated that the placement costs of the Los Angeles County Bureau of Adoptions are no less than $800.00 per case, not including the medical services furnished its

[33]*Op. Cit.*, at p. 610.

[34]52 Cal. 2d 310, 341 P.2d 6.

clients without charge by the Los Angeles County Hospital, State and County relief payments, Aid to Needy Children payments and other benefits provided by the taxpayers. The bureau's fee, however, is fixed by law at $400.00.

Generally, private charitable agencies charge fees of from $400.00 to $600.00 for their services. According to the director of one such agency:

> "In terms of the number of children placed annually and our total expenditures, the cost for placing a child would be approximately $1500.00. However, because we are members of the [Community] Chest and because we receive some funds from friends, we have established a fee of $550.00 to be paid by the adopting parents."[35]

The only licensed adoption agency in Los Angeles County which does not depend upon charitable or tax support to make up an operating deficit is The Adoption Institute. The Institute fixes its fee to the adopting parents by dividing its annual expense by the number of placements made. Partial fees are charged to cover the cost of services rendered applicants with whom no child is placed. During the past several years, the Institute's fee has been $1125.00 per placement. A substantial number of children placed by the Institute are born at taxpayer's expense in the Los Angeles County Hospital or other public institutions. None of the agency fees include the attorney's fee required for handling an agency adoption petition.

The cost of independent adoption in Los Angeles County falls within the same general range as those described above. Some cases cost less, others more. The overall cost is not particularly meaningful unless the reasonableness of each item is considered. It is the attorney's duty in every case to satisfy his clients and himself that all medical charges, legal fees and other expenses are reasonable in relation to the services rendered and the actual needs of the parties.

The mere fact that an adoption is involved does not justify a higher fee, nor compel a lower one, than that which would be charged for comparable services in other types of cases. The attorney or physician should consider only those factors normally involved in setting professional fees: the nature of the case, its difficulty, the skill required in its handling, the attention given, the success or failure of the practitioner's efforts, the practitioner's skill and learning, including his age and experience in a particular type of work demanded.[36] All items

[35] *Bonapart, Adoption Procedures at Vista Explained,* Vista Del Mar Reporter, December, 1960.

[36] See *Los Angeles v. Los Angeles-Inyo Farms Co.* (1933) 134 Cal. App. 2d 368, 376, 25 P.2d 224.

of cost should be itemized for and discussed with the adopting parents prior to their assuming any responsibility for payment.

There is some doubt as to the propriety of payment by adopting parents for the support and maintenance of a mother in the event she is unable to support herself. Most practitioners agree that adopting parents can properly pay all medical, legal and maintenance expense necessarily and reasonably related to the pregnancy and the mother's health.[37] Such items, in addition to hospital, medical and legal bills, often include a mother's rent, a reasonable amount for food, maternity clothes, and necessary transportation.

In every case, the mother's ability to support herself should be carefully examined before any payments for her maintenance are made. Other sources of support should be examined. She may be eligible for public assistance or may have friends or family willing to help her. Some practitioners have been quite successful in arranging for some assistance from the child's father.

If the necessity of such payments is established, the lawyer should make sure that they are directly related to the minimal budget which will decently support the mother. Such payments should only be made from funds deposited by the adopting parents in the attorney's trust account and should be completely accounted for to the adopting parents and the social welfare investigator.[38]

Some Superior Courts now require disclosure of all costs, fees and ex-

[37]See *Manual of Adoptions for Physicians, Op. Cit.*, pp. 3-4.

[38]See *Family Law for California Lawyers, Op. Cit.*, p. 360.

penses in adoption matters. Legislation is now pending in the Assembly to make a full disclosure to the court under oath mandatory.[39] Many believe a mandatory full disclosure of money involved can benefit the public and professions alike. The court would be given a sound basis for inquiry into services rendered, expenses actually paid or, in agency cases, contributions or pledges which might have influenced the placement. It would aid in uncovering unconscionable fees or charges, "baby selling' or other improper conduct and facilitate reference of such matters to the appropriate professional or governmental authority for discipline or prosecution. An important fringe benefit to the professions would be the removal of mystery surrounding adoption costs: a mystery on which repeated and often groundless charges of "black marketing" and other malfeasance in the professions is based.

The attorney's role in independent adoptions is an important and delicate one. His judgment and advice are often relied on in determining an infant's future. In rendering his services he must be true to the highest standards of responsibility and ethical conduct demanded by the Bar. He must encourage thoughtful and responsible decisions by all parties concerning the child's welfare.

The vast majority of attorneys in the independent adoption field have adhered to such standards and, in so doing, have rendered an honorable and invaluable service to children, parents and the community of which their colleagues can be proud.

[39]Assembly Bill No. 726, California Legislature, 1961 Regular (General) Session, introduced by Messrs. Kilpatrick, Kennick, Elliott and McMillan.

this legal maneuver is attempted to get a new and different investigator appointed, with the hope of a different recommendation. It is also not an uncommon practice in divorce cases to find that there have been several substitutions of attorneys, the disgruntled party retaining new counsel who is unfamiliar with prior proceedings and too busy to inspect the voluminous file. In one such case four different investigators had been appointed over a two-year period.

The present practice is to question closely the advisability of authorizing a re-investigation a short time after a hearing and determination of the question of custody has been made, and if an investigation is warranted the case is assigned to the investigator who previously reported on the matter. This not only saves time, but discourages "shopping" tactics.

(10) The investigator's report customarily restricts itself to the physical and material factors involved in the controversy over custody of minor children. In certain cases the principal area of exploration and investigation is the emotional stability of the parents or children. In such cases, referring one or both parents or child or children to a psychologist or psychiatrist for an examination and report to the court provides a more satisfactory solution. The court maintains an accredited list of psychologists and psychiatrists who will perform such examinations for a nominal amount since one of the parties is ordered to pay for such examination.

(11) A special note should be made concerning the restriction on witnesses furnished by the parties to be interviewed. The rule is that each party is entitled to three witnesses, never more than four. This does not include independent witnesses interviewed, such as school officials, doctors, etc. Experience has shown that a party's three best witnesses will provide adequate information; additional ones are merely cumulative and corroborative. This rule, of course, does not preclude the investigator from exercising his discretion and interviewing additional witnesses, if the facts so indicate.

Case in Point

Section 138 of the California Civil Code does not give a mother an ab-

solute, undisputed right to the custody of minor children. The law says, and rightly so, that other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor and business, then to the father.

The principal concern throughout all custody proceedings of both investigator and court, should be the best interests and welfare of the child. A case in point will best illustrate the importance of this fundamental concept.

A mother was granted custody of three children three years ago – two daughters, now 14 and 12, and a boy now 9.

The father remarried a year ago and is living in a spacious home, he being employed in an executive position by a large corporation. He has been paying a total of $550 child support and alimony per month. Mother and children live in a three-bedroom apartment.

The undisputed facts show that the mother has become a chronic alcoholic, permits the children to fend for themselves, and spends her support money at bars and on a ne'er-do-well divorced alcoholic who is not supporting his children of a prior marriage. He stays in the mother's apartment, frequently sleeping there, and the 14-year old daughter testified she found them in bed, drunk and nude.

The father, alarmed at the situation, instituted proceedings to secure custody of the children. None of the children indicated they wanted to live with the father, all having a protective attitude toward their mother.

A psychologist, from whom the mother was taking treatment for alcoholism, verified the mother's condition, expressing hope there might be

some chance for improvement, and suggested that leaving the children with her might aid in her rehabilitation.

The recommendation was accepted by a court commissioner who volunteered that in his opinion granting custody to the father might aggravate the mother's condition.

It is readily apparent that the commissioner was not only completely ignoring the clear language of the statute, but was not acting in the best interests of the children. We should all be concerned with the rehabilitation of weak and unfortunate individuals, but such rehabilitation should not be at the expense and to the detriment of minor children.

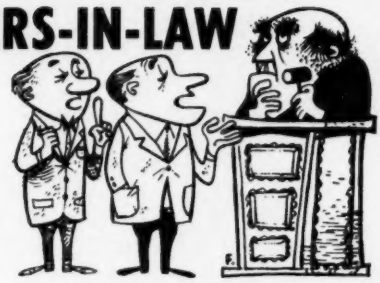
Conclusion

This resume does not purport to cover all procedures and problems affecting domestic relations investigations or the conduct of its investigators, but simply attempts to present some of the more common problems that frequently arise.

We have found in Los Angeles County that the utilization of trained court investigators has produced many beneficial results. It has substantially eliminated long and lengthy controversial court hearings, thereby saving a great deal of valuable judicial man hours, which can be utilized in hearing other contested civil actions. It has reduced tensions and bitterness which otherwise would be engendered by defamatory accusations from the witness box in open court. Frequently the investigator's report provides a practical blueprint for amicable custody and visitation arrangements.

Proof of the effectiveness of court investigators is evidenced by the endorsement and support of such procedures by both the bench and bar.

BROTHERS-IN-LAW



By
GEORGE
HARNAGEL, JR.

BACK TAXES

» » THIS IS INCOME TAX TIME . . . which makes us speculate on the kind of problems that would have plagued our ancestors if the tax had been in effect in days of yore . . . Can't you visualize an agent raising these pertinent issues: "I question these excessive deductions for fire damage, Mr. Nero" . . . or "Were *three* ships absolutely necessary, Mr. Columbus?" . . . or "Can you prove this was a business trip, Mr. Revere?", . . . or "I know you cannot, Mr. Washington, but I've got to check your return."—*The Shingle* of the **Philadelphia** Bar Association.

We believe that our readers, by taxing their minds a bit, could add to that list. We'll lead off with:

"No, Mr. Franklin, you'll have to capitalize that kite."

"Sorry, Mr. Lafayette, you can't deduct your expenses of coming over, but we might let you write off that uniform. That is, if you can prove you brought it with you. But then, of course, you'll have to square yourself with the customs people."

"That's right, Mr. Blue Beard. All *we're* interested in is the fact she was living on January 1."

"Well, Mrs. Godiva, the feed bill and the sunburn lotion seem reasonable, but just the same. . . ."

* * *

The World: A big ball that revolves on its taxes.—*Kansas City Star.*

Pole and Other Taxes

For the past month the American people have been wrestling with their tax returns. It's a process that has been going, in one way or another, since the memory of man runneth not to the contrary.

Bruce G. McGregor is our authority for advising you that the following tax report was filed by Asael Smith in 1791 in Tunbridge, Vermont:

I have two poles tho' one is poor,
  I have three cown & want five more,
I have not horse, But fifteen sheep;
  No more than these this year I keep,
Stears, that's two years old, one pair,
  Two calves I have, all over hair,
Three heffers two years old, I own
  One Heffer calf that's poorly grone,
My land is acres Eighty two
  Which search the Record youle find true,
And this is all I have in store,
  I'll thank you if youle Tax no more.

We asked Bruce what "two poles," the first item in the report, means in modern English. He's not sure, but thinks they were "china pole pigs." As for Asael Smith, the plaintiff and poetic taxpayer, Bruce is brimful of information: "Asael Smith was the son of Samuel Smith, who was the Chairman of the Boston Tea Party. Asael Smith was also the grandfather of the prophet, Joseph Smith, Jr., through whom the Church of Jesus Christ of Latter-Day Saints was restored April 6, 1930, . . . [and] the great great grandfather of George Albert Smith, eighth President [of that Church]."

Speaking of the Boston Tea Party, we read somewhere that if the colonists thought that taxation without representation was tyranny they should see what it is *with* representation.

* * *

Our Big Brother-in-Law

The day after we sent to the printer the typescript for "Pole and Other Taxes" (which should turn up somewhere in this department this month) we again encountered the commentary on taxation without representation vis-a-vis taxation with representation. This time it was included in the choice selection of Americana, collected in the course of his official travels, with which Whitney North Seymour, President of the ABA, enlivened his address to the March meeting of our Association. He attributed it to a speaker at a meeting which he recently attended in Colorado. This led us to try to check back, without much success, on our own source. Apparently we picked it up from something like *P. G. & E. Progress*, which picked it up from something like *California Farmer*, which doubtless picked it up from some other publication. Very likely, as with most quips which pass in the night, the true author will never be known.

We would like to say something which would make those who missed the March meeting feel very badly, for they should. Mr. Seymour, without sacrificing the dignity of his office or impairing the impact of his observations on the importance of an independent bench and bar, was just as informal and relaxed as your next door neighbor—a quality not widely regarded as typical of the Manhattan bar, although one we have observed from time to time in some of its most distinguished members.

He either has an amazing ability to keep himself well informed on conditions and personalities indigenous to the locale of his various appearances, or he was unusually well-briefed for this particular occasion. He seemed to touch, directly or obliquely, on all topics recently agitated in this jurisdiction, beginning with his reference to the fact that the ABA was founded (in the same year as our Association) at Saratoga Springs, the seat of a famous race track.

Returning to his selection of Americana, best of all—and those who missed it should indeed feel very badly—was his rendition of the politician's answer to the question: "What do you think of whiskey?" This he said he'd picked up in Oklahoma, where he'd been given exclusive rights to it for the duration of his term of office. We will not infringe those rights, but will simply say that he announced in advance that it was going to be good and that it was very good.

* * *

It's a Fact

When it comes to income tax, even the dull minds can make some very clever deductions.—*Tax Topics.*

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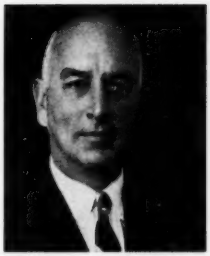


☆ ☆ ☆ ☆ ☆ ☆ ☆ ☆ A. STEVENS HALSTED, JR.

» » OF THE MANY USEFUL PROJECTS sponsored by the organized Bar in recent years, none, it seems to me, has greater potentialities than one undertaken by the House of Delegates of the American Bar Association at its mid-February meeting at Chicago. The 258-member body resolved:

"That through our members and the cooperation of state and local bar associations we encourage and support our schools and colleges in the presentation of adequate instruction in the history, doctrines, objectives and techniques of communism, thereby helping to instill a greater appreciation of democracy and freedom under law and the will to preserve freedom."

This resolution was adopted without a single dissenting vote. That so many lawyers should come to an agreement on *any* issue is in itself impressive.

The A.B.A.'s program is not limited to the organized Bar but takes in individual lawyers as well. While I intend to suggest to the Board of Trustees that our Association follow the lead of the A.B.A., I make this separate appeal to our members.

During the years since World War II I have wondered from time to time at the ignorance—a more tolerant term would be apathy—of the American people about communist activities, an unconcern that seems to have filtered into our government. Certain examples come to my mind. Some of them may have rational explanations; if so I have never come across them. In what is to follow I intend no criticism of either political party nor of any individual, so if you are tempted to infer at any point of the discussion that I am covertly casting aspersions upon F.D.R., Harry or Ike—forget it.

One incident that has always puzzled me is the apparent ease with which we permitted communism to swallow China. Before the actual takeover I recall some talk about "agrarian reformers," but when the chips were down and they took off their masks, the leaders of this movement turned out to be disciplined, Moscow-trained communists. I remember the suppression of the Wedemeyer report by our government but I cannot reconstruct the details. I wonder how many others are equally vague? Can it be that this lapse of memory is due to our indifference to the communist threat? I like to think that a similar happening today, when we have a clearer view of communism, would be engraved on our minds forever. But I'm not so sure it would. Too many of us, I fear, still find difficulty in properly evaluating the reality of the communist danger.

What about Korea? Could we have done anything to prevent the cutting of that country in two? Could we have avoided the Korean war without los-

ing ground to the communists? And if not, was it wise to forbid our flyers to pursue enemy planes into Red China? I hope the answers to these questions are clearer to you than they are to me.

Most recently we have witnessed the spectacle of communism taking over Cuba. I, for one, was surprised when I learned only too promptly after the take-over that Fidel Castro was a communist or, what amounts to the same thing, a communist tool. I had thought of him as a dedicated revolutionary whose sole purpose was to relieve the people from the rigors of the Batista dictatorship. Every thoughtful person must be alarmed that such a communist coup could be accomplished without press warning only a few miles from our shores.

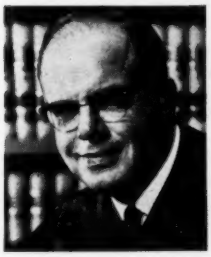
Other similar events could be mentioned but space will not permit. The incidents mentioned are sufficient to suggest that the free world has not been as alert as it should have been to the reality of the communist menace or the effectiveness of communist activities. If any of these enemy successes can be attributed to laxness on the part of our government, or worse still to communistic infiltration in the agencies responsible for our safety, —then we can be sure that the lackadaisical attitude of the American public toward communism has contributed to this evil in an appreciable degree. An informed and alert citizenry is bound to exert a healthy influence upon those in our government whose duty it is to combat communism. The government needs and is entitled to have this support.

At the moment I cannot say what measures the Board of Trustees will see fit to undertake in line with the A.B.A. resolution. Whatever they may be and whatever they may accomplish, I am convinced that each of us has the power to contribute something, however seemingly small, to the A.B.A. program. I run across many people whose thinking about communism is fuzzy, and so do you. Each of us should constitute himself a committee of one to enlighten these people. Perhaps all of us could profit by putting in a little time on the study of communist techniques and objectives, to the end that an informed citizenry can better defend and preserve our American heritage.

THIS MONTH'S COVER

The gentleman on the cover is the late Lucien Shaw, who was a member of the California Supreme Court during the period from 1903 to 1923 and briefly served as its Chief Justice. Justice Shaw was a member of the committee which reactivated the Los Angeles Bar Association in 1888 (the Association had originally been formed in 1878, but faded away in the early 1880's), and served as its President in 1901 and 1902. Justice Shaw's frequent opinions were characterized by thoroughness and lucidity. See, for example, 166 Cal., *passim*, and in particular *People v. California Fish Co.*, 166 Cal. 576 (1913).

Peculiarities and Pitfalls of Mandate



By Ellsworth Meyer
Judge, Superior Court

» » THE EDITOR OF THE BAR BULLETIN has requested that I set out some of the law and procedural steps with which counsel should be familiar when considering whether a proceeding for a writ of mandate can be successfully undertaken.

In the past several years this special proceeding has taken on new significance to the practitioner because of the increase in the number of administrative agencies and the number of occupations subject to licensing.

History

The history of the writ should be borne in mind because the writ still bears some of its early distinguishing marks. Originally in England mandamus was a writ issued by the king to command the performance of some act. Later it became a judicial writ issued by the Court of King's Bench to remedy official inaction.[1] It was a common law remedy unknown to the courts of equity.[2] In California it has always been a special proceeding,[3] has an anglicized name, "mandate,"[4] and in addition to traditional subject matter has been made the statutory[5] method of judicial review of administrative decisions,[6] insofar as the same are subject to judicial review.

Application

Mandate is still the proper writ to compel an administrative agency or officer to perform a ministerial act which it or he is duty bound to perform, such as: crediting taxes to the proper fund,[7] the examination of a recall petition to determine its sufficiency,[8] publishing a notice of sale of bonds,[9] the signing of bonds or the execution of a contract which has been awarded.[10] The primary question in cases of this type is whether the act is ministerial or whether the agency or officer has discretion. If it or he has a discretion to act or not, mandate will produce nothing. If there is a duty to act, but a discretion to act one way or another, action may be compelled by mandate, but it cannot be used to compel action in a particular direction.

Counsel are more apt to be consulted relative to a matter involving the denial, suspension, or revocation

[1]U.S. v. Bd. of Dirs. of Public Schools, 143 C.C.A. 303, 229 Fed.1.
[2]Bates v. Baumbeur, 239 Ala. 255, 194 So. 520; 179 Md. 665, 22A. 2d 472.
[3]C.C.P., sec. 23, 1063 et seq.
[4]C.C.P., sec. 1084.
[5]C.C.P. sec. 1094.5.
[6]Law Review articles have criticized its selection instead of review (certiorari).
[7]Long Beach School Dist. v. Payne, 219 Cal. 598.
[8]Barnes v. Zemansky, 176 Cal. 369.
[9]Golden Gate etc., v. Felt, 214 Cal. 308; Solvang etc. Dist. v. Jensen, 111 Cal. App. (2d) 237.
[10]Williams v. Stockton, 195 Cal. 743.

of a professional or vocation license, or a zoning, demolition or building permit case than matters discussed in the paragraph last above. Therefore, this article will examine mandate from that standpoint. What is stated hereinafter about service of process and pleadings applies to cases involving a ministerial duty, but what is said about determining the weight of evidence does not.

Also, there are a few variations when the application (to compel a ministerial act) is made originally to an appellate court. Judicial Council rules cover these and they will not be further noted herein.

Given a client, the first thought of the lawyer should be as to the agency involved, because the extent of judicial review, limited at best, depends upon the agency involved. If the agency is a city or county board or official or a statewide agency provided by the constitution, the possible judicial review is very limited. If the agency is a statewide one created by the legislature and the decision is *not* a denial of the issuance of a license, judicial review is not as limited as with the first class mentioned.

The difference between the two classes of agencies arises from the holding that the legislature cannot vest judicial power in a statewide agency.[11] This principle, of course, does not prevent such a vesting by the constitution itself and is not applicable to city and county agencies.[12] This appears to be a more accurate basis than to speak of local agencies, as some decisions have, as inferior courts. They are not courts.[13]

If the decision is that of a city[14] or county[15] department or official, a non-legislative decision of a city council[16] or board of supervisors, or of a constitutionally created state agency (alcoholic beverage control,[17] horse racing,[18] state personnel,[19] fish and game,[20] boxing and wrestling[1] and health[2]), judicial review is limited to the ascertainment of whether there was any substantial evidence to support the decision. The courts do not reweigh the evidence before the agency.

The same rule has been applied to a denial of a license or restoration subsequent to a revocation by a statewide agency created by the legislature.[3]

If the decision does not involve the denial or restoration of a license and is by the state medical or dental board, or the commissioners of real estate, insurance, or building and loan, or the registrar of contractors, or a board or official enumerated in Section 11501 of the Government Code, judicial review will extend to reweighing the evidence before the agency to determine whether the weight thereof supports or is contrary to the decision.

De Novo Review

During a brief period there were a few appellate decisions which referred to judicial review of administrative decisions as a trial *de novo*, These, if not researched further, might mislead. The court proceeding is not

[11]Standard Oil Co. v. St. Bd. of Equal. 6 Cal. (2d) 557; Drummey v. St. Bd. of Funeral Dirs., 13 Cal. (2d) 75.

[12]People v. Provines, 34 Cal. 520.

[13]Chinn v. Superior Court, 156 Cal. 478.

[14]Fascination Inc. v. Hoover, 39 Cal.(2d) 260.

[15]Damiani v. Albert, 48 Cal.(2d) 15.

[16]Jenner v. City Council, 164 Cal. App.(2d) 490.

[17]Const. art. XX, sec. 22.

[18]Ibid. sec. 23a; So. Cal. Jockey Club v. Cal. Horse R. Bd., 36 Cal.(2d) 167.

[19]Const. art. XXIV, secs. 2, 3.

[20]Const. art. IV, sec. 25-1/2.

[1]Ibid., sec. 25-3/4.

[2]Const. art. XX, sec. 14.

[3]McDonough v. Goodcell, 13 Cal.(2d) 741; McDonough v. Garrison, 68 Cal. App. (2d) 318; Glick v. Scudder, 69 Cal. App.(2d) 717; Housman v. Bd. Med. Examrs., 84 Cal. App.(2d) 308.

a trial *de novo* in the commonly understood meaning of that term.[4] As indicative of later expressions as to review under the substantial evidence rule, it was stated in *Board of Trustees v. Munro*, 163 Cal. App. 2d 440, 445: "There can be nothing in the nature of a trial *de novo* in the reviewing court."

As to those administrative decisions subject to the weight of evidence rule, it might be advantageous for counsel to have in mind, as an analogy, appellate review of a trial court decision where it is contended that the evidence is insufficient to support the judgment or verdict. Such is not a trial *de novo* in the commonly accepted definition of that term.

The next consideration of counsel should be the time prescribed for various steps which must be taken. Here the practitioner will encounter some of the peculiarities of a mandate proceeding and may find it desirable to count backward from the several deadlines.

Procedure

The filing and service of a complaint *ex delicto* or *ex contractu* is more leisurely and luxurious than in mandate. A petition for a writ of mandate must be served on the adverse party or parties before filing.[5] After it is filed (recently changed from served), the adverse party has five days in which to file points and authorities in opposition to the issuance of the first process, the alternative writ. The careful practitioner will, therefore, count backwards the five days allowed for points and authorities, the number of days it will take to make service and obtain an affidavit thereof, and act accordingly.

While a few state agencies have authorized an employee in Los Angeles to accept service of petitions, in a larger number of cases it is necessary to effect service in Sacramento and occasionally in some other part of the state. Service is authorized on (1) the presiding officer of a board or commission, (2) the secretary or (3) on a majority of the members thereof.[6] Continuing backward, counsel must allow the time it will take him to prepare a petition which will be sufficient to result in the issuance of an alternative writ, and this means a petition which states facts constituting a cause of action and not one containing conclusions of the pleader as to essential elements. That there was no substantial evidence,[7] the agency or commissioner abused discretion,[8] acted arbitrarily,[9] or the decision was not supported by the evidence[10] are mere conclusions and insufficient.

In seeking judicial review of the action of a city or county agency it is particularly important to remember that the issues may become moot if counsel does not move rapidly.

As to statewide agencies the starting gun is the last day on which the agency can order a reconsideration of its decision. In almost every instance this is the date the decision was mailed plus thirty days, plus one day for each hundred miles or fraction the mailing must travel[11] (Sacramento to Los Angeles, thirty plus five days). Thus the date upon which the decision becomes final is determined. The

(Continued on page 245)

[4]Dare v .St. Bd. of Med. Examrs., 21 Cal.2d 790.
[5]C.C.P., §1107.
[6]Ibid.
[7]Black v. State Personnel Bd., 136 Cal. App.(2d) 904.
[8]Cross v. Tustin, 111 Cal. App.(2d) 395.
[9]Kelley v. Kingsbury, 210 Cal. 37.
[10]Perry v. Chatters, 121 Cal. App.(2d) 813.
[11]Pesce v. Dept. A.B.C., 51 Cal.(2d) 310.

Proving State of Mind: Opinion Evidence

By William L. Scott

Member,
Thompson, Waters, Moss,
Scott & Riordan,
Los Angeles

» » AT A TRIAL the question is asked a banker, "In your judgment, did Mrs. Doe understand what you explained to her?" Opposing counsel objects, "The question calls for an opinion; how can the witness know what Mrs. Doe's state of mind was or what she understood?" Should the objection be sustained or overruled?[1]

Proving the state of mind of a person can be a frustrating and difficult task. State of mind cannot be demonstrated and is exhibited only circumstantially. Nevertheless, under the substantive law it becomes the decisive issue in many types of actions. In preparing the issue for trial, consequently, it is worth while exploring every type of probative evidence which might be admissible on the subject.

The commonly accepted methods of proving state of mind are (1) the direct testimony of the person whose state of mind is in question, (2) declarations of the person whose state of mind is in question, and (3) evidence of facts and circumstances existing at the time the state of mind exists.[2] If, under the circumstances of a particular case, these methods are available and prove the point, the proof problem disappears. But not infrequently, such evidence is meager and leaves something to be desired, especially in cases where a party must prove the state of mind of his adversary or of a person not available as a witness.

Another method of proof which should not be overlooked in preparation is the opinion testimony of witnesses who have had an adequate opportunity to observe the person whose state of mind is in issue during the time it exists. For the most part, such testimony is held inadmissible because it is a "mere" opinion, conclusion or impression. The courts tend to adhere rigidly to the opinion exclusion. In a few instances, however, opinion testimony, or what amounts to opinion testimony, has been permitted to prove state of mind. A review of some of the California decisions will serve to indicate the extent to which this type of testimony has thus far been allowed.

---

[1]See *Pfingst v. Goetting*, 98 Cal. App. 2d 293 (1950) discussed below under the heading of "Understanding."

[2]For examples of the use of each of these methods, see, respectively, cases cited in Witkin, California Evidence, §§173, 268-271, 157.

Rationality

Most of the California cases have dealt with the state of rationality. The types of testimony considered in this category include "clearness of mind," "sanity," "competency," "alertness" and the state of being "rational or irrational."

In introducing testimony on this subject, it is necessary to observe a distinction which has developed between an "opinion" of rationality and the "appearance" of rationality. To understand the application of this distinction, a few of the earlier cases must be examined. In the first California case on rationality, *People v. Sanford*,[3] the Supreme Court approved of opinion testimony going directly to state of mind. In the *Sanford* case, defendant was charged with murder. The prosecution, in attempting to prove a dying declaration, asked a witness to "state the condition of mind of the deceased at the time [of the declaration]—whether it was clear or confused." Over objection, the witness was permitted to testify "in substance, that judging from the conversation of the deceased at the time, his mind was clear." The Supreme Court held the question proper, adopting the reasoning generally relied upon when allowing opinion evidence:

"It is said here, for the prisoner, that this was the expression of a mere opinion, by a non-expert witness, and should have been excluded on that ground. We do not think so. We understand the rule on this point to be that a witness, even though not an expert, who details a conversation had between himself and another, may also, in connection therewith, state his opinion, belief, or impression as to the state of mind of such person, as these seemed or appeared to the witness at the time of the conversation. The impression made upon the mind of Burns, to the effect that the mental condition of the deceased was unobstructed, was an impression he had formed by personal observation. He had heard the utterances of the deceased; these he could repeat, or substantially repeat, to the jury; but he had also observed his tone, gesture, appearance, and his general demeanor at the time; these he could not be expected to reproduce to the jury as he saw and observed them; nor could he even describe them in giving his evidence, without in some degree indicating his own opinion or impression of what they were—and this, it is said, he may not be permitted to do. We think, however, that this cannot be said to be an expression of the mere opinion of the witness in the objectionable sense."[4] The inability to express or describe observations accurately is usually relied upon as the basis for admitting opinion testimony.

A few months after the *Sanford* case was decided, California enacted the Code of Civil Procedure. Section 1870, Subdivision 10, provided (as it still does) that evidence could be introduced in a trial of "the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given." This provision differed from the holding in the *Sanford* case in one significant aspect: by implication, the qualification was added that the person testifying had to be an "intimate acquaintance." No such limitation is found in the *Sanford* decision and, apparently for this reason, later California cases have not followed the *Sanford* holding when dealing with rationality.[5] A witness is

[3] 43 Cal. 29 (1872).

[4] id., at pp. 32-33.

[5] The *Sanford* case has been cited and relied upon in other jurisdictions, e.g., *Conn. Mut. Life Ins. Co. v. Lathrop*, 111 U.S. 612 (1884). It still should be considered as having precedence value in California for states of mind other than rationality.

generally not permitted to express his opinion unless he is an "intimate acquaintance."[6]

However, later cases do follow the spirit of the *Sanford* holding and achieve virtually the same result by the use of the "appearance" distinction. The first decision after the enactment of Section 1870 to be faced with the problem of admitting opinion evidence of a witness who was not an "intimate acquaintance" was *People v. Lavelle*.[7] The defendant was charged with assault with intent to commit murder. One of the witnesses, a deputy sheriff present at the time of arrest of the defendant, was asked the question, "What was the appearance of this man (the defendant) at that time with reference to his being rational or irrational?" Objection was made to the question on the ground that the witness was not competent to testify because it had not been shown that he was an "intimate acquaintance" within the meaning of Section 1870. The Supreme Court held that the question was proper, making the following distinction:

> "The evidence sought to be elicited was not the opinion of the witness as to the mental sanity of the defendant, based on an acquaintance with him, but was rather as to a fact, namely, his appearance at the time. The appearance of a person at a given time is one thing; the opinion of a witness as to the mental condition of that person, based on an acquaintance with him, is quite another."[8]

The validity of the Court's distinction is questionable. The only reasonable inference that can be drawn from the testimony sought in the *Lavelle* case, if it is accepted at all by the trier of fact, is the witness's opinion of the defendant's state of mind. Phrasing the question in terms of "the appearance" instead of "your opinion" would seem to be merely a change in form, not in meaning.[9] But the reasoning of the *Lavelle* case has generally been accepted and followed by the California decisions.[10] If counsel want to avoid the risk of having their evidence excluded, their examination should be directed to appearances and not opinions of rationality. Of course if a witness is an "intimate acquaintance" his opinion is admissible under Section 1870.

Understanding

Testimony on the ability of a person to understand generally what is going on about him is another way of showing rationality and it is similarly treated.[11]

Questions have also been allowed when directed, not merely to general understanding, but to whether a person affirmatively understood the legal consequences of a particular transaction. In *Pfingst v. Goetting*,[12] the case from which the question in the opening paragraph was taken, the heirs of a decedent contested the validity of a

[6]See cases cited in Footnote 10, infra.

[7]71 Cal. 351 (1886).

[8]Id., at p. 352.

[9]See *Estate of Carpenter*, 94 Cal. 406, 416 (1892); cf., *De Arellanes v. Arellanes*, 151 Cal. 443, 450 (1907).

[10]*In Re Wax*, 106 Cal. 343, 349-350 (1895) (Action contesting probate of will on incompetency; question permitted, "How did he conduct the transaction of borrowing the money, paying the interest, etc.?"); *People v. Manoogian*, 141 Cal. 592, 594-598 (1904) (Defense of insanity in murder case; question referring to defendant permitted, "what was his appearance at those times when he talked to you, with reference to his being or acting as men ordinarily do in their right minds, or otherwise?"); *De Arellanes v. Arellanes*, 151 Cal. 443, 450 (1907) (Action to set aside deed on incompetency; court allowed witness to testify that the grantor was "in a perfectly rational condition, and that her mind was clear." on the ground that such testimony was really a description of appearances).

[11]*Carleton v. Bonham*, 60 Cal. App. 725, 730-731 (1923) (Action to set aside deed on incompetency; question permitted whether decedent "in all her business transactions at the bank . . . appeared to be keen mentally and a business woman."); *Jorgensen v. Dahlstrom*, 53 Cal. App. 2d 322, 337 (1942) (Court approved of testimony, "In all the transactions we had with her, why, we considered her a woman of very alert mind and positive in her manner. . . . I would consider that Mrs. Jorgensen was a very alert business woman.").

[12]96 Cal. App. 2d 293, 301-308 (1950).

joint bank account which the decedent had opened with her nephew shortly before her death. In substance, the heirs contended that the decedent had not understood the meaning of the right of survivorship clause. One of the employees of a bank who had explained the subject to decedent at the time the account was opened, was asked by counsel for the nephew, "In your judgment, at that time could she understand what was explained to her?" Over the objection that the witness was not an intimate acquaintance, he was permitted to answer, "Perfectly." On appeal, the Court affirmed the Trial Court's ruling and held that the question was proper, relying on the statement that "Such facts may be stated . . . by any witness who has observed them. They are mere matters of observation and not of expert knowledge."[13] It is worthwhile noting that the Court appears to have confused and reversed the application of the appearance distinction; the question is phrased expressly in terms of opinion and is allowed on the basis that it calls for an "observation."

Emotions and Temperament

The cases generally approve of the admission of opinion testimony on emotions and temperament. The basis relied upon is the same as expressed in the *Sanford* case that such states of mind are impossible to express completely and accurately without also permitting the witness to state his opinion. In *People v. Deacon*,[14] a murder case, defendant objected to allowing a witness to testify "to the spirit or tenor of voices that he heard in the room directly above his own." The witness had been permitted to testify that the voices denoted "anger." The District Court of Appeal held that the testimony was proper because anger could only be described as a conclusion.

Other California cases have stated by way of dictum that opinions may be given on whether or not a person was "excited," "timid," "melancholy," "peevish," "irritable," "fearful" and the like.[15]

Intoxication

The Courts have had no difficulty in accepting opinion evidence on intoxication. Earlier cases on the subject approved of questions phrased in terms of whether a person "appeared" intoxicated.[16] Later decisions make it clear that questions can properly be phrased in terms of the opinion of a witness and need not refer to appearances.[17]

Intention and Motive

Intention and motive are probably the categories of states of mind most often found in issue, and they serve to accent the desirability of permitting the introduction of as much trustworthy evidence as exists to prove state of mind.

Intention and motive, as categories, differ in degree from intoxication or emotions, for example, in that they are less often manifested in a usual or set manner and hence, may more often be difficult to observe accurately. This is not to say that they are never manifested in a recognizable fashion nor that, in instances in which they are observed, opinion evidence should be excluded. Nevertheless, the Courts do categorically exclude such evidence

[13]96 Cal. App. 2d 293 (1950) at p. 306.
[14]117 Cal. App. 2d 206, 210 (1953).
[15]*People v. Arrighini*, 122 Cal. 121, 123 (1898); *Holland v. Zollner*, 102 Cal. 633, 638 (1894).
[16]*Finn v. Sullivan*, 110 Cal. App. 38, 40 (1930) (Question permitted, "What was his . . . apparent condition at the time with reference to being intoxicated or otherwise?"); *People v. Sehorn*, 116 Cal. 503, 511 (1897).
[17]*People v. Moore*, 70 Cal. App. 2d 158, 164-165 (1945) (Officer permitted to give his "opinion" that complaining witness had not been intoxicated.); *People v. Hernandez*, 70 Cal. App. 2d 190, 192 (1945).

with little or no discussion of the matter.[18]

Greve v. Echo Oil Company,[19] illustrates the inflexibility with which the opinion rule is applied. In that case, plaintiff H. J. Greve sued on several claims, two of which had been assigned to him by a husband and wife. The husband had assigned one of the claims to plaintiff and the wife had assigned the other. In the instruments of assignment, however, plaintiff's initials were transposed and the assignments were made to "J. H. Greve." Defendant contended that the assignments had not been made to plaintiff because of the difference in initials. At the trial, plaintiff sought to prove that the initials had been transposed by mistake and that the assignments were intended to be directed to him. Plaintiff put the husband on the stand and had him testify first to the circumstances surrounding the making of both assignments. Plaintiff then, after showing that the husband had been present when his wife executed her assignment, directed a question specifically to the wife's assignment and asked, "To whom did she intend to execute that assignment?" Defendant objected to the question as being irrelevant, incompetent and not the best evidence. The Trial Court overruled the objection, and the witness answered, "H. J. Greve." In ruling on the admissibility of the husband's testimony, the Appellate Court held that it was reversible error to have overruled the objection because the question called for the opinion of the husband.[20]

This ruling seems harsh under the circumstances of the case. It is not unreasonable to conclude that the husband could accurately opine on his wife's state of mind on the basis of his relationship with her, his observation of her actions and speech in executing the assignment and his knowledge of the surrounding facts and background. Most of these facts, it is true, the husband could relate to the trier of fact but, after a lapse of time, probably not as completely or as accurately as if he were also permitted to sum up all of his observations by giving his opinion. Certainly, the husband had a better opportunity than the trier of fact to infer accurately his wife's state of mind. Yet, the trier of fact is required to decide the issue without being permitted to consider the husband's testimony.

Knowledge—Belief

Knowledge and belief are treated the same as intention and motive. "A witness cannot testify as to the knowledge or belief of another."[21]

In *Sneed v. Marysville Gas Etc. Co.*,[22] an action for wrongful death, a mother, who had lived with her son up to the time of his death, was not permitted to state her opinion on whether her son had "any knowledge of electricity or its dangers." The son had been accidently electrocuted. The Court observed that "ordinarily one person cannot know what is in the mind of another." The foundation laid

[18]*Brown v. Ratliff*, 21 Cal. App. 282, 295 (1913) (Employee of a corporation not permitted to testify to the intention of the "officials" of the corporation in causing a certain ditch to be constructed.); *Estate of Boole*, 98 Cal. App. 714, 720 (1929) (Widow not permitted to opine on whether her deceased husband had made certain gifts to their children in contemplation of death); *Huyck v. Rennie*, 151 Cal. 411, 415 (1907) (Question not permitted, "Do you know whether or not your niece had any intentions of marrying him?"); *Butler v. Stratton*, 95 Cal. App. 2d 23, 27 (1949) (Objection sustained to question asking whether the witness lived in a house by permission of another.).

[19]8 Cal. App. 275, 281 (1908).

[20]The court ruled alternatively that the husband's opinion should have been excluded because it was based on a hearsay declaration of his wife. This alternative ground would be a valid basis for excluding the testimony were the husband to have based his opinion solely on his wife's declaration; however, from the recitation of facts in the court's opinion, it appears that the husband did observe other competent and relevant facts from which he could have accurately formed an opinion on his wife's state of mind. Id., at pp. 279-282.

[21]*Huyck v. Rennie*, 151 Cal. 411, 415 (1907).

[22]149 Cal. 704, 707-708 (1906).

to admit the mother's opinion was weak, but the holding is based on the opinion exclusion rule, not lack of foundation.

Conclusion

The cases have not approached this subject with entire consistency and logic. For some states of mind, opinion evidence is admissible on a case by case basis provided an adequate foundation is laid; for other states of mind, opinions are categorically excluded whether or not a sufficient foundation can be shown. One reason perhaps for this apparent inconsistency is a difference in the attitudes of Courts on the inherent trustworthiness of such evidence. In many cases, scepticism is expressed or implied of the ability of persons accurately to observe and form opinions on the state of mind of another. Granted that such scepticism may be justified when confined to the facts of a particular case, still it should not be generalized and made the basis of an inflexible rule. Common experience shows that intelligent persons can and do form opinions of what other people think and that they make responsible decisions upon the basis of their opinions. Moreover, it does not seem logical to rely on such scepticism as a valid basis for exclusion of all opinion evidence when, in each action in which the issue is raised, the trier of fact must itself opine on state of mind —and accurately we hope.

Whenever a witness has had an opportunity actually to observe a person's appearance, speech and actions and, from his observations and general experience, is able to form an opinion on that person's state of mind, it is reasonable to permit him to testify to his opinion in order to assist the trier of fact in determining the issue. Such a rule should increase the probabilities that the issue will be correctly decided. Requiring an adequate foundation and the right to cross examination provide sufficient safeguards on a case by case basis to protect the trier of fact against inaccurate opinions.

General criticism of the inflexible application of the opinion rule has often been expressed. In the recent case of *People v. Otis*,[23] the District Court of Appeal observed that, "The historical development of the opinion rule shows it is not immutable. Originally the rule did not exclude, but only limited, the weight of such opinion rule shows it is not immutable. generally accepted modern version of the rule solidifies it into an absolute form has provoked adverse comment . . . and the demand that it be recast in a more practical as well as sensitive formula." These remarks seem especially applicable to state of mind cases.

[23]174 Cal. App. 2d 119, 127-128 (1959); See also authorities cited therein.

Notice to Historians, Local and International

The bottom of the once vast reservoir of BULLETIN cover material is showing. Do not reduce us to reruns of courthouses, beards, and leftist Daumier caricatures. Mail or bring any written or pictorial material which you believe to be appropriate (or interesting) for the BULLETIN's cover to the Association offices, or, if you prefer, simply notify us of your archives and we will send a suitable representative to examine them.

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THE LOS ANGELES BAR BULLETIN

solute, undisputed right to the custody of minor children. The law says, and rightly so, that other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor and business, then to the father.

The principal concern throughout all custody proceedings of both investigator and court, should be the best interests and welfare of the child. A case in point will best illustrate the importance of this fundamental concept.

A mother was granted custody of three children three years ago – two daughters, now 14 and 12, and a boy now 9.

The father remarried a year ago and is living in a spacious home, he being employed in an executive position by a large corporation. He has been paying a total of $550 child support and alimony per month. Mother and children live in a three-bedroom apartment.

The undisputed facts show that the mother has become a chronic alcoholic, permits the children to fend for themselves, and spends her support money at bars and on a ne'er-do-well divorced alcoholic who is not supporting his children of a prior marriage. He stays in the mother's apartment, frequently sleeping there, and the 14-year old daughter testified she found them in bed, drunk and nude.

The father, alarmed at the situation, instituted proceedings to secure custody of the children. None of the children indicated they wanted to live with the father, all having a protective attitude toward their mother.

A psychologist, from whom the mother was taking treatment for alcoholism, verified the mother's condition, expressing hope there might be

some chance for improvement, and suggested that leaving the children with her might aid in her rehabilitation.

The recommendation was accepted by a court commissioner who volunteered that in his opinion granting custody to the father might aggravate the mother's condition.

It is readily apparent that the commissioner was not only completely ignoring the clear language of the statute, but was not acting in the best interests of the children. We should all be concerned with the rehabilitation of weak and unfortunate individuals, but such rehabilitation should not be at the expense and to the detriment of minor children.

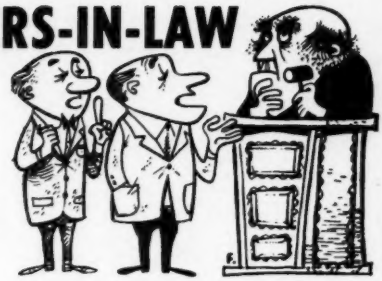
Conclusion

This resume does not purport to cover all procedures and problems affecting domestic relations investigations or the conduct of its investigators, but simply attempts to present some of the more common problems that frequently arise.

We have found in Los Angeles County that the utilization of trained court investigators has produced many beneficial results. It has substantially eliminated long and lengthy controversial court hearings, thereby saving a great deal of valuable judicial man hours, which can be utilized in hearing other contested civil actions. It has reduced tensions and bitterness which otherwise would be engendered by defamatory accusations from the witness box in open court. Frequently the investigator's report provides a practical blueprint for amicable custody and visitation arrangements.

Proof of the effectiveness of court investigators is evidenced by the endorsement and support of such procedures by both the bench and bar.

BROTHERS-IN-LAW



By
GEORGE
HARNAGEL, JR.

BACK TAXES

» » THIS IS INCOME TAX TIME . . . which makes us speculate on the kind of problems that would have plagued our ancestors if the tax had been in effect in days of yore . . . Can't you visualize an agent raising these pertinent issues: "I question these excessive deductions for fire damage, Mr. Nero" . . . or "Were *three* ships absolutely necessary, Mr. Columbus?" . . . or "Can you prove this was a business trip, Mr. Revere?", . . . or "I know you cannot, Mr. Washington, but I've got to check your return."—*The Shingle* of the **Philadelphia** Bar Association.

We believe that our readers, by taxing their minds a bit, could add to that list. We'll lead off with:

"No, Mr. Franklin, you'll have to capitalize that kite."

"Sorry, Mr. Lafayette, you can't deduct your expenses of coming over, but we might let you write off that uniform. That is, if you can prove you brought it with you. But then, of course, you'll have to square yourself with the customs people."

"That's right, Mr. Blue Beard. All *we're* interested in is the fact she was living on January 1."

"Well, Mrs. Godiva, the feed bill and the sunburn lotion seem reasonable, but just the same. . . ."

* * *

The World: A big ball that revolves on its taxes.—*Kansas City Star.*

Pole and Other Taxes

For the past month the American people have been wrestling with their tax returns. It's a process that has been going, in one way or another, since the memory of man runneth not to the contrary.

Bruce G. McGregor is our authority for advising you that the following tax report was filed by Asael Smith in 1791 in Tunbridge, Vermont:

I have two poles tho' one is poor,
  I have three cown & want five more,
I have not horse, But fifteen sheep;
  No more than these this year I keep,
Stears, that's two years old, one pair,
  Two calves I have, all over hair,
Three heffers two years old, I own
  One Heffer calf that's poorly grone,
My land is acres Eighty two
  Which search the Record youle find true,
And this is all I have in store,
  I'll thank you if youle Tax no more.

We asked Bruce what "two poles," the first item in the report, means in modern English. He's not sure, but thinks they were "china pole pigs." As for Asael Smith, the plaintiff and poetic taxpayer, Bruce is brimful of information: "Asael Smith was the son of Samuel Smith, who was the Chairman of the Boston Tea Party. Asael Smith was also the grandfather of the prophet, Joseph Smith, Jr., through whom the Church of Jesus Christ of Latter-Day Saints was restored April 6, 1930, . . . [and] the great great grandfather of George Albert Smith, eighth President [of that Church]."

Speaking of the Boston Tea Party, we read somewhere that if the colonists thought that taxation without representation was tyranny they should see what it is *with* representation.

* * *

Our Big Brother-in-Law

The day after we sent to the printer the typescript for "Pole and Other Taxes" (which should turn up somewhere in this department this month) we again encountered the commentary on taxation without representation vis-a-vis taxation with representation. This time it was included in the choice selection of Americana, collected in the course of his official travels, with which Whitney North Seymour, President of the ABA, enlivened his address to the March meeting of our Association. He attributed it to a speaker at a meeting which he recently attended in Colorado. This led us to try to check back, without much success, on our own source. Apparently we picked it up from something like *P. G. & E. Progress,* which picked it up from something like *California Farmer,* which doubtless picked it up from some other publication. Very likely, as with most quips which pass in the night, the true author will never be known.

We would like to say something which would make those who missed the March meeting feel very badly, for they should. Mr. Seymour, without sacrificing the dignity of his office or impairing the impact of his observations on the importance of an independent bench and bar, was just as informal and relaxed as your next door neighbor—a quality not widely regarded as typical of the Manhattan bar, although one we have observed from time to time in some of its most distinguished members.

He either has an amazing ability to keep himself well informed on conditions and personalities indigenous to the locale of his various appearances or he was unusually well-briefed for this particular occasion. He seemed to touch, directly or obliquely, on all topics recently agitated in this jurisdiction, beginning with his reference to the fact that the ABA was founded (in the same year as our Association) at Saratoga Springs, the seat of the famous race track.

Returning to his selection of Americana, best of all—and those who missed it should indeed feel very badly—was his rendition of the politician's answer to the question: "What do you think of whiskey?" This he said he'd picked up in Oklahoma, where he'd been given exclusive rights to it for the duration of his term of office. We will not infringe those rights, but will simply say that he announced in advance that it was going to be good and that it was very good.

* * *

It's a Fact

When it comes to income tax, even the dull minds can make some very clever deductions.—*Tax Topics.*